Supreme Court, U.S.
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No. 06-628

In the
Supreme Court of the United States
October Term, 2006

Derrick Ramon Dukes,
Petitioner,
Vs.
State of Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should *Crawford v. Washington* apply to an already final 1994 state murder case where the defendant raised a Confrontation Clause challenge in his direct appeal but did not seek a writ of certiorari, did not seek habeas corpus relief, did not raise a Confrontation Clause claim in his first petition for a writ of certiorari but did claim denial of his Sixth Amendment right to effective assistance of counsel, and where any error was harmless?

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OPINIONS BELOW

1. *State v. Dukes*, 544 N.W.2d 13 (Minn. 1996). The Minnesota Supreme Court affirmed Petitioner's conviction on direct appeal, holding in part that the conviction did not violate his Sixth Amendment right to confrontation. Petitioner did not seek a writ of certiorari.

2. *Dukes v. State*, 621 N.W.2d 246 (Minn. 2001). The Minnesota Supreme Court ruled that Petitioner's Sixth Amendment Confrontation Clause claim was procedurally barred, but remanded the case for a further hearing on other issues, including an ineffective assistance of counsel claim. Petitioner did not seek a writ of certiorari to challenge the Confrontation Clause ruling.

3. *Dukes v. State*, 660 N.W.2d 804 (Minn. 2003). The Minnesota Supreme Court affirmed the denial of post conviction relief after additional hearing for a claim of ineffective assistance of counsel. The petition for a writ of certiorari was denied. *Dukes v. Minnesota*, 124 S.Ct. 1069 (2004).

4. *Dukes v. State*, 718 N.W.2d 920 (Minn. 2006). The Minnesota Supreme Court affirmed the denial of Petitioner's *Crawford v. Washington* claim, holding that the decision is not retroactive to cases that were already final. Petitioner seeks review of this decision.

JURISDICTION

Petitioner invokes the jurisdiction of this Court to review the final judgment of the highest state court to rule on his case, pursuant to Title 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION

Petitioner alleges that his Sixth Amendment right to Confrontation was violated at trial in 1994.

STATEMENT OF THE CASE

Petitioner Derrick Ramon Dukes was found guilty by a state court jury in 1994 of first degree murder in violation of Minnesota Statutes § 609.185 for aiding and abetting the murder of Joseph McKinney, and of attempted first degree murder of Bennie Chaney. He was sentenced to life in prison for the murder conviction and to a consecutive term of 180 months for the attempted murder conviction.

The license number of the car used to transport Petitioner and his co-defendants from Minneapolis to St. Paul was traced. Petitioner was identified as the owner of the car. The murder weapon was found in Petitioner's jacket pocket. Bennie Chaney identified Petitioner at trial as one of the men who attacked him.

Petitioner's co-defendant Kevin Lewis tendered a guilty plea in return for a promise for a reduced sentence, but with the stipulation that he would not receive the reduced sentence unless he testified against his co-defendants at their trials. He refused, however, to testify at Petitioner's trial and the agreement was revoked. Lewis was separately tried and convicted of the same crimes. *See, State v. Lewis*, 547 N.W.2d 360 (Minn. 1996).

The transcript of Lewis's tendered guilty plea was offered against Petitioner as a statement against Lewis's penal interest. Rather than seeking redaction of the transcript pursuant to *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) after the trial court ruled that portions would be admissible, Petitioner's attorney asked that the entire transcript be admitted. Petitioner offered another inculpatory statement by Lewis that differed from the guilty plea transcript so that Petitioner could argue that Petitioner was only marginally involved and that Lewis was not entitled to belief.

The Minnesota Supreme Court affirmed Petitioner's conviction on direct appeal, holding that admission of the transcript of Lewis's guilty plea—which inculpated Petitioner—did not violate Petitioner's right to Confrontation as explained in *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597 (1980). Their ruling is at *State v. Dukes*, 544 N.W.2d 13, 19 (Minn. 1996).

Petitioner did not seek a writ of certiorari to challenge the Minnesota Supreme Court ruling that

admission of Lewis's guilty plea transcript was not a violation of Petitioner's right to Confrontation under the Sixth Amendment. Petitioner has never sought a writ of habeas corpus to raise the claim in Federal Court, and would be time-barred from doing so. Petitioner's conviction was final no later than May 17, 1996.

Three years later, in 1999, Petitioner filed a state-court petition for post conviction relief that included six claims, including that he was denied his right to Confrontation under the Sixth Amendment by the admission at trial of the transcript of Lewis's guilty plea. *See, Dukes v. State*, 621 N.W.2d 246, 250 (Minn. 2001). The District Court found that Petitioner had already raised the Confrontation Clause claim on direct appeal and therefore was procedurally barred from raising it in a subsequent post conviction proceeding. The Minnesota Supreme Court affirmed the ruling that the Confrontation Clause claim was procedurally barred. *Id.* at 251.

Petitioner did not seek review of the decision of the Minnesota Supreme Court that his Confrontation Clause claim was procedurally barred. In the same decision, however, the Minnesota Supreme Court remanded the case to the District Court for further findings on two other issues. After the District Court again denied relief the Minnesota Supreme Court again affirmed. *Dukes v. State*, 660 N.W.2d 804 (Minn. 2003).

Petitioner sought a writ of certiorari to review the decision of the Minnesota Supreme Court that he

had not been denied his Sixth Amendment right to the effective assistance of counsel at trial, but did not attempt to seek review that his Confrontation Clause claim was procedurally barred. The petition for a writ of certiorari was denied. *Dukes v. Minnesota*, 124 S.Ct. 1069 (2004).

Petitioner again sought state-court post conviction relief after this Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The District Court denied relief, and the Minnesota Supreme Court affirmed, holding that Petitioner was not entitled to retroactive application of the decision to his Confrontation Clause claim because Petitioner's conviction was already final at the time of the decision. *Dukes v. State*, 718 N.W.2d 920, 922 (Minn. 2006). Petitioner seeks review of this decision.

REASONS FOR DENYING THE PETITION

Petitioner Derrick Ramon Dukes seeks retroactive application of this Court's 2004 Sixth Amendment Confrontation Clause ruling in *Crawford v. Washington* to overturn his 1994 state-court murder conviction even though the conviction was final no later than 1996 and even though Petitioner did not seek every possible avenue to have this Court or any other Federal Court review the state Supreme Court decision that held that his Confrontation Clause rights were not violated under the law as understood at the time.

Petitioner has not attempted to show that there was any "cause" that prevented him from pursuing his Confrontation Clause claim, and he makes no allegation that he is actually innocent of the murder and the attempted murder. The petition for a writ of certiorari should be denied.

Petitioner claimed at trial and on direct appeal that the admission of a transcript of the inculpatory portions of the guilty plea of his non-testifying co-defendant Kevin Lewis violated his right to Confrontation under the Sixth Amendment. *State v. Dukes*, 544 N.W.2d 13 (Minn. 1996). But Petitioner did not pursue that claim by seeking a writ of certiorari from this Court after his conviction was affirmed by the Minnesota Supreme Court, and did not seek to raise the claim by collateral habeas corpus attack in Federal Court. Petitioner's conviction was final no later than May 17, 1996.

Petitioner also raised a Confrontation Clause claim in his first state-court petition for post conviction relief, in 1999. But Petitioner did not seek a writ of certiorari when the Minnesota Supreme Court held that the claim was procedurally defaulted because already raised and decided on direct appeal. Nor did Petitioner seek review of that decision when he sought a writ of certiorari to review the denial of his other Sixth Amendment claim, that he had been denied effective assistance of counsel.

Petitioner may not now seek habeas corpus relief. More than one year has passed since his conviction became final. Because Petitioner failed to

pursue the Confrontation Clause claim that he now raises, he would not be allowed to raise the claim in a habeas corpus proceeding unless he demonstrated both cause for his failure to raise the issue and actual prejudice. *Bousley v. United States*, 523 U.S.614, 622, 118 S.Ct. 1604, 1611, 140 L.Ed.2d 828 (1998), *citing Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 2643-44, 91 L.Ed.2d 397 (1986).

A Petitioner may establish "cause" for failure to raise a claim and avoid the consequences of procedural default if the claim "is so novel that its legal basis is not reasonably available to counsel." *Bousley v. United States*, *supra*, at 622, 1611. But there is nothing novel in the idea that a criminal defendant must have the right to cross-examine the witnesses whose testimony is used to establish the defendant's guilt. Petitioner has not shown any cause for failure to seek a writ of certiorari after the first Minnesota Supreme Court decision that his Sixth Amendment right to Confrontation was not violated.

Petitioner has not attempted to claim that he is actually innocent of the crimes for which he was convicted. A procedural default may be excused in a habeas proceeding if the petitioner can establish that he was "actually innocent" of the crimes. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *citing Murray v. Carrier, supra.* Petitioner cannot establish a claim of actual innocence in this case, where he was identified at the scene as one of the three perpetrators of the offense, he owned the car used to transport the perpetrators to the scene of the crimes, and the murder weapon was found in his

pocket. Any error in admitting the transcript of Lewis's guilty plea—not redacted at Petitioner's request—was harmless.

Petitioner may not seek habeas corpus relief from his conviction because he did not seek to do so in a timely manner. The Minnesota Supreme Court held, in the appeal from the first denial of state-court post conviction relief, that Petitioner is not entitled to raise a Confrontation Clause challenge because the claim was already raised and decided in the direct appeal. That final judgment on that issue was not open for renewed consideration.

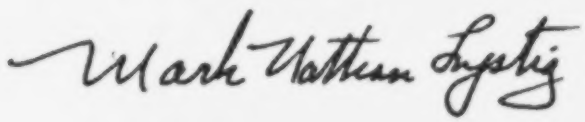
Petitioner's conviction was final in 1996, and he did not seek review of his conviction by petition for a writ of certiorari after his Confrontation Clause claim was denied by the Minnesota Supreme Court. The current petition for a writ of certiorari should be denied because Petitioner has procedurally defaulted his right to raise the claim, and has made no showing that he is actually innocent of the crimes such that the ruling in *Crawford v. Washington* should be applied to his final judgment.

CONCLUSION

Petitioner Derrick Ramon Dukes did not pursue a Confrontation Clause claim by petition for a writ of certiorari or petition for Federal habeas corpus after his conviction was affirmed by the Minnesota Supreme Court in 1996. Because he has not established either cause for failing to pursue the claim or that he is actually innocent of the crimes, the rule in *Crawford v. Washington* should not be retroactively applied to his case. His conviction is final. That finality should not be disturbed.

Dated: 1-29-07

Respectfully submitted;



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